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Arbitration and American Business*

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Throughout the ages—from the dawn of history, as we know it for some six thousand years—there have been disagreements and controversies among men and women with others in their own communities, disagreements and controversies between communities and between nations. Too frequently have these different points of view and different desires led to armed conflict with the loss of life, of freedom and of property that always results from the brutality of war.

Disagreement and controversy are not inherently evil. For, from the conflicting theories and ideas of scientists, teachers, religious leaders, economists and politicians have come the discoveries, inventions, social progress and economic betterment that have given many millions of people better living conditions, both economic and politic, which men and women of good will everywhere hope will come, as we progress, to many more millions of our fellow human beings.

But when the disagreements of people cause them to abandon their religious and humane principles so that they neglect the ways of peaceful adjustment of their difficulties, we may well wonder if we have achieved the stage of civilization of which we often boast.

Arbitration as a means of adjudicating differences among individuals and among States is not new or even of recent origin and development. From the earliest days of which we have historical records, villages, cities, city states and nations, their merchants and traders in the conduct of their domestic and foreign trade have submitted their disputes to disinterested people for adjudication. And while not all losers have gracefully accepted the award rendered by the arbitrator, the recognition of arbitral awards and the adoption, at least of commercial arbitration, has expanded greatly and has been used increasingly widely within countries and in the commercial relations of business men and government agencies that are engaged in the production of goods and their movement in international trade.

I do not wish to talk at length of what we do in the United States in the field of arbitration. Our Federal Law and the laws of most of

* From a speech delivered at the Congress of the International Chamber of Commerce, in Vienna, Austria, May 22, 1953.

our important industrial and commercial states recognize the validity of the arbitration clause in a contract and uphold the arbitration award whether the arbitration is conducted in the United States or abroad. In addition to the American Arbitration Association which is active throughout the United States there are many local Chambers of Commerce and trade and commodity associations that have their own arbitral mechanisms. And in addition to what is commonly termed commercial arbitration, there has been a steady growth in the inclusion of voluntary arbitration clauses in the contracts between trade unions and employers so that many labor disputes can be submitted to arbitral adjudication.

The business man of the democracies has a greater responsibility in the troubled world of today than ever before in history. As managers of the industrial and commercial companies that comprise the free enterprise system they have responsibilities to their consuming citizens and to their employees as well as to their shareholders. Hence if we business men assume the leadership that is thrust upon us by virtue of the needs of our economic system, we can do much if we foster and encourage the use of arbitration in the settlement of the disputes that we have among ourselves. But beyond this limited sphere of commercial arbitration, its successful and expanded use may act as an example and stimulus to our own governments and to other governments to seek through conciliation and arbitration a means for composing their differences without resort to armed conflict. Such an accomplishment would be a contribution by the business man and his business organizations to the welfare of hundreds of millions of people far transcending what we do in our daily business activities and would in some measure at least show our willingness and eagerness by example and by teaching to help in the cause of peace and in the cause of economic and political freedom and progress.

Arbitrator's Authority in Disciplinary Cases

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The unanimous decision of the Connecticut Supreme Court of Errors reversing a lower court decision and upholding the right of an arbitrator to substitute a lay-off of one week for the company's penalty of discharge for insubordination brings into sharp focus a fundamental difference much discussed between substantial segments of management and unions, as well as among arbitrators, as to the arbitrator's authority in discharge cases where the union denies that there had been "just cause" for the employee's discharge.

The framework within which this problem arises may be stated as follows:

1. The employee is discharged for a specific infraction of plant rules, or for committing one or more offenses;
2. The clause in the collective bargaining contract, a commonly used one, provides that "an employee may be discharged for just cause," or words to that effect;
3. The union disputes the propriety of the company's action in discharging the employee, claiming the discharge was not for "just cause";
4. The arbitration clause in the contract provides that "disputes involving the interpretation, application or alleged violation of the provisions of this contract, if not resolved by the parties, may be submitted to arbitration";
5. The issue submitted to the arbitrator states, "Was the employee, F—D, discharged for just cause," or words to that effect.

Query: What question or questions have the parties submitted to the arbitrator under the foregoing submission, i.e., what question or questions have the parties given or intended to give the arbitrator jurisdiction over or authority to decide and award upon?

Pinpointing the basic difference that arises out of the answer to that question, we need to ask:

Is there only one question submitted to the arbitrator, namely, was there "just cause" for the *disciplinary action* taken—irrespective of the kind or degree of that disciplinary action? or,

Does the *propriety* of the disciplinary action taken constitute an-

other question properly before the arbitrator and which he has authority under the submission to determine?

Depending upon the answers to those questions, the following arise:

If the arbitrator finds that there was "just cause" for some form of disciplinary action, is he constrained to uphold the disciplinary action—say discharge—decided upon by the company? or

If the arbitrator finds that there was not "just cause" for the penalty of discharge, can he also find that there was just cause for some other kind of punishment or disciplinary action? and, can he then void the discharge and award a different kind of disciplinary punishment?

Judging by their awards and accompanying opinions, there are a substantial group of arbitrators who take the position that under the above-stated submission, the parties intend to give to the arbitrator authority to inquire into the degree of punishment in determining the issue of "just cause," in any disciplinary case, including a discharge case.

The reason in support of this position may be stated as follows:

In the absence of any qualifying contract provision, or facts showing a contrary intent, the arbitrator in a disciplinary case must be satisfied on three points:

1. That the employee was guilty of the charge, i.e., that he committed the offense complained of;
2. That disciplinary punishment was warranted under the circumstances; and
3. That the degree of punishment imposed—discharge—was just and proper, i.e., that the "penalty fitted the crime."

The last point, it is argued, is just as much a part of the contract phrase "just cause" as are the first two points; and that the parties intended this last point to be considered by the arbitrator in determining the case. A punishment that fits the crime is equally a part of "just cause" and must be proved to the arbitrator's satisfaction.

Thus, in a number of discharge cases, arbitrators, even though "finding" that the employee committed the offense charged and that some form of punishment or disciplinary action was warranted under the circumstances, have not sustained the penalty of discharge. In some cases, they have reinstated the employee, without back pay; in others, they have modified or reduced the punishment.

Under this position, it does not follow, as is sometimes charged, that the arbitrator has "compromised" the case, or as the lower Court,

in the *Niles-Bement-Pond Company* case, referred to later, puts it, that "he seeks a middle course for an amicable solution which alternately praises and scolds the parties."

Rather, the arbitrator has acted under the above stated three criteria, which he "finds" is the proper interpretation and application of the "just cause" contract clause. In the absence of any contract language showing a contrary intent, the arbitrator construes the discharge clause to give him that authority. In those cases where the arbitrator considers the degree of the disciplinary punishment as part of the phrase "just cause," and modifies the penalty imposed, he has "found," in effect, that the disciplinary action taken, was not for "just cause."

The dissenting opinion of Judge Dore, in *Simon v. Stag Laundry, Inc.*, 259 App. Div. 106, 18 N. Y. S. 2d 197 (1940), supports this position. He says:

> "Inherent in the determination that the employee be reinstated is a finding that the discharge was wrongful. That determination was clearly within the scope of the arbitrator's jurisdiction on the submission."

Judging also from the substantial number of awards rendered in discharge cases, in which arbitrators have taken this position, it appears that there is a substantial segment of both management and unions which support or acquiesce in this position.

The proponents of the contrary position, from which the basic difference here discussed arises, maintain that under the above-stated submission, the arbitrator does not have the authority, nor do the parties intend to give the arbitrator the authority to review the penalty imposed, or to "substitute" his judgment for that of management as to what penalty is proper.

The reasoning in support of this position may be stated as follows:

Under the contract and submission agreement above-stated, the arbitrator has the authority only to consider the first two criteria—whether the offense was committed, and whether punishment was warranted. These are the only material questions which the parties intended the arbitrator to inquire into and over which he has authority to act.

The degree of punishment, or the kind of penalty imposed by management in the case, it is argued, is not part of "just cause." It is not material to any finding of "wrong" and it is not reviewable by the arbitrator. Thus, if the arbitrator "finds" that the employee committed the wrong complained of and he was disciplined for that wrong,

then the arbitrator is constrained to sustain the disciplinary action taken by management, whatever penalty was imposed. Under this position, neither the union nor the employee can complain that the "discharge" was not for "just cause." The arbitrator's action in changing a penalty, under this position, constitutes an abuse or usurpation of authority, not given by the contract, nor intended by the parties. In other words, that the arbitrator has exceeded his authority or "powers."

From a review of the court cases that have come to the writer's attention, it appears that the Courts, in the cases coming before them, have supported in the main this latter position.

In the *Simon* case the Appellate Division, reversing the lower court, denied confirmation of the arbitrator's award. In that case, the employee had been discharged "because of certain irregularities in the performance of his duties constituting dishonesty." The union claimed that the discharge was "without cause." In his award, the Impartial Chairman, named in the contract, directed that the employee be reinstated on probation with loss of pay for four weeks. The contract provided:

> "In the event that a discharge is determined by the Impartial Chairman to have been wrongfully effected, such discharged employee shall be immediately reinstated."

The majority of the Appellate Court held that the Impartial Chairman had "failed to make any finding on the one issue which was before him, namely, as to whether Gingold's discharge was wrongfully effected."

In vacating the award and remitting the dispute to the Impartial Chairman "for disposition in accordance with the terms of the arbitration agreement," the Court stated:

> "We are unable to agree with the respondent's (Union) claim that the award made necessarily implies that the Impartial Chairman found that the discharge was unjustified. The fact that the arbitrator imposed a loss of four weeks' pay leads to no other conclusion than that the discharge was not wrongfully effected."

As pointed out before, one of the Judges of the Appellate Division dissented, on the grounds that:

> "Both parties pursuant to their agreement submitted the controversy for arbitration to the impartial chairman and agreed that the decision 'shall be binding and final upon all

> parties with regard to any matter submitted to him.' Inherent in the determination that the employee be reinstated is a finding that the discharge was wrongful. That determination was clearly within the scope of the arbitrator's jurisdiction on the submission."

In another New York case, *Modernage Furniture Corporation* v. *Weitz, 64 N.Y.S. 2d 467* (1946), the Court at Special Term set aside an arbitrator's award and directed that it be modified "by providing that Brotman's discharge was justified." In that case, the employer had made ten specific charges against the employee, for which he had been discharged. The arbitrator dismissed eight of the charges. The arbitrator held that "two of the charges had been sustained by the employer, that is, failure to control lateness and failure to have a salesman stationed in the front part of the store." As to the charge of lateness, the arbitrator found, for reasons stated, that the employee's discharge "could not be justified on that ground."

As to the remaining ground, the arbitrator held "that management had the right to insist that its sales manager enforce its policy with respect to sales procedure" and that "Wilful refusal, or for that matter, inability on the part of its sales manager to enforce this policy after due warning should, in the opinion of the Arbitrator, be deemed sufficient cause for discharge."

Commenting on this latter finding, the Court said:

> "After reaching this conclusion, however, the arbitrator seeks to dispose of the issue by giving Brotman a 'warning' and by providing that he may institute a system 'within a reasonable time, say two weeks from the date of the award,' of having the front of the store amply covered by a salesman whenever all salesmen are not busy waiting on customers.
>
> "It is needless to point out that the arbitrator had no authority to make such disposition of the matter, and having found Brotman guilty of the charge he should have reached the only legal conclusion possible, that is, that the employer had the right to discharge Brotman."

In the case of *Samuel Adler Inc.* v. *Local 584, Int'l. Brotherhood of Teamsters, Chauffeurs, Warehousemen & Helpers of America,* N.Y. L.J. December 24, 1952, p. 1586, the Court at Special Term held that "the submission presented just one question: 'Was the discharge of Terrence Boyle proper under the contract?'" The arbitrator reinstated the employee with back pay, "except for the forfeiture of two weeks' wages."

The Court set aside the award, stating:

> "A reading of the award shows that it is in contradiction of the findings of the arbitrator and goes beyond the arbitration submission. * * *
>
> If the driver was guilty of a violation of the contract, then the discharge of the driver was proper. If, on the other hand, there was no violation of the contract, then there should have been no penalty assessed against the driver. The finding that the discharge was not proper and then making the driver forfeit two weeks' wages cannot be reconciled. The form of the award is an imperfect execution of powers conferred upon the arbitrator."

The Union appealed that decision. On June 2, 1953, the Appellate Division, First Department, reversed the lower Court and reinstated the arbitrator's award (N.Y.L.J. June 15, 1953, p. 1995).

The majority of the Court held that on the facts disclosed "the arbitrator's award was not improper or inconsistent and the arbitrator did not exceed his powers." After reciting the material facts involved in the case, the Court, through a per curiam opinion, said:

> "A reading of the arbitrator's decision and award in its entirety shows that he found on the facts and on his interpretation of the contract that the discharge was not proper.
>
> While the issue of reinstatement and its terms was not expressly submitted to the arbitrator, it is necessarily implicit in submitting issues that could and did result in a finding of improper discharge. Since the employee involved was found by the arbitrator to be guilty of wrongful conduct, although not sufficient to justify dismissal, the award properly required that he be reinstated. It also fined him two weeks' pay. No objection was made by the union to the penalty and presumably it is satisfied entirely with the award. Since, concededly, the arbitrator had power to order reinstatement, there is no reason why a condition could not be attached."

It is interesting to note the following developments:

Justices Dore and Cohn participated as members of the Appellate Court in both the *Simon* case, decided in 1940, cited above, and in this recent *Samuel Adler* case.

Mr. Justice Cohn joined with the majority in the *Simon* case, to vacate the arbitrator's award. He dissented from the majority in the *Samuel Adler* case, on the ground that the arbitrator had "exceeded the authority conferred upon him by the written submission and by statute * * *."

Mr. Justice Dore, who was a lone dissenter in the *Simon* case, became part of the majority in this later case. You will recall that in the *Simon* case, Mr. Justice Dore said:

> "Inherent in the determination that the employee be reinstated is a finding that the discharge was wrongful. That determination was clearly within the scope of the arbitrator's jurisdiction on the submission."

Now note the similar conclusion reached by the majority of the bench in the *Samuel Adler* case, to wit:

> "Parties who submit to arbitration submit all issues of fact and law including the interpretation of the terms of the contract. A reading of the arbitrator's decision and award in its entirety shows that he found on the facts and on his interpretation of the contract that the discharge was not proper."

It appears that Mr. Justice Dore's reasoning in the 1940 case—on the extent of the arbitrator's authority in disciplinary cases under contract clauses and submission agreements of the type here discussed—has now been accepted as the prevailing opinion by that court.

In the case of *American Safety Razor Corp.* v. *Local 475, United Electrical Radio & Machine Workers of America,* 280 App. Div. 800, 113 N.Y.S. 2d 232 (1952), the arbitrator's award directed that an employee who had been discharged for violation of a company rule, found by the arbitrator to be reasonable, be offered reinstatement on a day four months after the date of such discharge. The Court vacated the award, on the grounds that:

> "In so directing the arbitrator acted beyond the scope of the submission and in violation of the express agreement of the parties, in which provision is made for arbitration."

In the case of *Niles-Bement-Pond Co.* v. *Amalgamated Local 405, International Union, United Automobile, Aircraft and Agricultural Implement Workers of America,* the arbitrator found that the penalty of discharge was not warranted for the insubordination of which the employee had been guilty in refusing to return a stool to its proper location at the request of the foreman and held that the employee should be reinstated with the loss of one week's pay.

The Superior Court in Hartford, Connecticut, in a decision of June 12, 1952 (digested in *Arb. J.* 1952, p. 177), set aside the award on the ground that the arbitrator had no authority to decide other than the fact as to whether or not the employee had been insubordinate; in having found insubordination, the company had the right to impose such penalty as it wished.

The Connecticut Supreme Court of Errors, in an opinion by Judge Baldwin, in which the other judges concurred, held in reversing that

the arbitrator had the authority "to determine whether or not Lajoie's action was so grossly insubordinate as to constitute grounds for discharge," and that the company's argument that the arbitrator was precluded from determining whether the disciplinary action by the company should be suspension or discharge was untenable. The court held "in the first place the primary question was not whether Lajoie's conduct amounted to insubordination but whether it constituted just cause for his discharge." The contract gave the company the right to " 'suspend or discharge for cause any employee in order to maintain discipline and efficiency in production' " subject, the court said, "to certain modifications."

"The Company can discharge or lay off an employee only for 'just cause.' " * * * Even though Lajoie had been insubordinate, it did not necessarily follow that he should have been discharged. There was still the question whether his insubordination was of such a nature as to constitute 'just cause' for his discharge."

The second case, *Fulton Markets, Inc.* v. *Amalgamated Meat Cutters and Butcher Workmen of North America, Local 371,* was decided by the Superior Court, New Haven County, Connecticut, on December 30, 1952 (digested in Arbitration Journal 1953, p. 62).

In that case, the issue submitted to the arbitrator was "Whether or not Joseph Mancuso was discharged for proper cause." The arbitrator found that there was no cause for discharge, but that there was cause for "suspension" and for "disciplinary action" and directed that the employee "be reinstated but without back pay."

The Company applied to the Court to vacate the award. Its application was denied. The Court confirmed the award, but modified and corrected it "by striking out all the provisions thereof, except the finding that Mancuso was discharged without proper cause." The Court stated:

> "It is my opinion that the only question properly before the arbitrator was whether Mancuso had been discharged for proper cause. It is apparent that this was also the opinion of the arbitrator * * *. In the body of his award he makes it clear that there was no proper cause for Mancuso's discharge. Had the award stopped at that point it would have been within the scope of the submission. The vice of the award is that it attempts to go beyond the terms of the submission and finds that, although there was no cause for discharge, there was cause for 'suspension' and for 'disciplinary action' and it then directs that Mancuso be reinstated but without back pay.

> These were not questions which the parties had asked the arbitrator to decide.
>
> "This does not, however, vitiate the whole award. Professor Sturges in his 'Commercial Arbitrations and Awards' at p. 574 states, 'Although an award is invalid in part it may be conclusive and enforceable as to the remainder if the valid and void parts are sufficiently independent and separable.' * * *
>
> "There can be no doubt that the arbitrator's findings that there was no proper cause for discharge is binding and must stand."

In only a fraction of the many disciplinary cases submitted to arbitration under collective bargaining contracts have parties resorted to the courts, questioning the scope of authority or the propriety of the arbitrator's actions under the contract or submission agreement. From those few cases, it appears that the courts, until recently, generally have answered the questions posed in this inquiry as follows:

1. That under the form of submission above stated, the Court takes the position that the parties have submitted only *one* question to the arbitrator, namely, whether the disciplinary action taken, irrespective of its degree, was for "just cause";
2. That if the arbitrator "finds" that the employee committed the offense, or was guilty of the infraction of the rule, the arbitrator is *constrained* to uphold the discharge as "the only legal conclusion possible"; and
3. That if the arbitrator "finds" that there was not just cause for discharge, he cannot "find" just cause for some other form of disciplinary punishment, i.e., he cannot void the discharge and award a lesser degree of punishment.

These conclusions stem from a narrow construction of the words used in the submission agreement or in the discharge clause. Whether the arbitrators in those cases exceeded their authority or "powers" or whether their awards went beyond the scope of the submission agreement is open to serious doubt. The New York appellate court in the recent *Samuel Adler* case, cited above, apparently changed its earlier opinion and held that in such cases the arbitrator did not exceed his authority and that his award did not go beyond the scope of the submission agreement. This present position supports in the main the prevailing position of a substantial segment of both management and unions, as well as arbitrators, as indicated below.

The jurisdiction and scope of authority of an arbitrator under a contract or submission agreement is for the court to determine and not the arbitrator. But in determining these questions, the court is constrained to apply the same rules of construction and interpretation that apply to all contracts, namely, ascertaining what authority the

parties *intended* to give to the arbitrator in a particular case. In this connection, the court needs to consider not only the language used but the custom, usage and commonly accepted practices that have grown up in disciplinary cases under collective bargaining contracts and the construction generally accorded similar discharge clauses and submission agreements by the parties themselves, as well as by arbitrators.

As pointed out before, a very substantial segment of both management and unions, as well as arbitrators, have interpreted and applied discharge clauses and submission agreements of the type before the courts in the cases above cited, to give the arbitrator authority to consider the degree of penalty in determining "just cause" for discharge. The extent of this custom, usage and practice is shown by a study made of arbitrators' awards in disciplinary and discharge cases by Professor J. M. Porter, Jr. Professor Porter's study (in the Proceedings of the Second Annual Meeting of the Industrial Relations Research Association, 1949) covered nearly 200 reported awards. He found that in

> ". . . 74 cases, which represent 38 per cent of the total number studied, the arbitrator's award sustained the disciplinary action taken by management. In the remainder of the cases studied, 121, which was 62 per cent of the total, the effect of the arbitrator's award was to either revoke or modify the discipline imposed by management. In this latter group of cases, the effect of the award was to completely revoke management's action in 49 per cent of the instances and to modify (i.e. reduce in severity) the discipline in 51 per cent of the instances."

It is true, as Professor Porter was careful to point out, that the "data were gathered from disputes which had been taken to arbitration and such findings may merely mean that unions are more apt to press discharge cases to arbitration than lesser forms of discipline."

It is also true that this study is limited, in that many awards in discharge cases are not reported or published. And further, many of them may have arisen under different types of contract clauses and submission agreements, in which the arbitrator's authority may have been spelled out more fully. And again, since very few of arbitrators' awards in discharge cases are taken to court for review of the arbitrators' authority, it may have been that the parties have acquiesced in the arbitrators' assuming authority, for reasons other than agreeing with the propriety of their actions. Yet, this study and the experiences of others concerned with the arbitration process under collective bargaining contracts, show that arbitrators have acted under the three

criteria pointed out above in deciding many of these cases. In view of this practice, and in the absence of any provision showing a contrary intent, doubt arises whether the courts have properly construed the contract or submission agreement in so limiting the jurisdiction or authority of the arbitrators in discharge cases.

From the standpoint of serving the needs of parties under collective bargaining contracts, giving the arbitrator authority to consider the degree of penalty as part of "just cause" serves the self-interests of the parties.

The type of discharge clause or submission agreement here considered, is often used to cover all forms and degrees of *disciplinary actions*. Even though the contract clause often refers only to "discharge," it is not necessarily limited to cases where the penalty imposed is discharge. Disciplinary cases in which warnings or suspensions are given, or some other type of punishment, short of discharge, is imposed, are contested by the union under the general "discharge clause." They are submitted to arbitration under that clause. The union in allowing management, under the exercise of its right of administrative initiative, to impose disciplinary punishment, reserves to itself the right to appeal management's actions to arbitration, if it feels that the action was not for just cause. This protects the union and the employees against what they may consider to be arbitrary or unjust action by management. Limiting the arbitrator's jurisdiction or authority in disciplinary cases, in the way indicated by the foregoing court decisions, may in the long run seriously hamper management in maintaining employee discipline and efficiency of production.

The decision of the Court in the *Fulton Markets* case, last referred to, shows the logical result of the narrow construction placed upon the arbitrator's authority. Even though the arbitrator finds no "just cause" for discharge, because the penalty "did not fit the crime," he is constrained to absolve the employee from all fault, even though he may find from the facts of the case that some lesser form of penalty was warranted and could have been upheld for "just cause." It is questionable whether this position, logical as it may seem, was really intended by the parties as serving their best self-interests.

In the final analysis, of course, it is up to the parties themselves to explicitly state in their contract or submission agreement just what authority or jurisdiction they want the arbitrator to exercise. They should not avoid their responsibility by leaving it to the individual arbitrator's choice or the vicissitude of court review and action.

Air Transport Agreements of the United States with many countries provide for an exchange of rights for international air carriers. These bilateral agreements also establish machinery for arbitration; the most recent one with the Republic of Cuba, of May 26, 1953, states in its Art. 13 the following:

> "Except as otherwise provided in this Agreement or its Annex, any dispute between the contracting parties relative to the interpretation or application of this Agreement or its Annex, which cannot be settled through consultation, shall be submitted for an advisory report to a tribunal of three arbitrators, one to be named by each contracting party, and the third to be agreed upon by the two arbitrators so chosen, provided that such third arbitrator shall not be a national of either contracting party. Each of the contracting parties shall designate an arbitrator within two months of the date of delivery by either party to the other party of a diplomatic note requesting arbitration of a dispute: and the third arbitrator shall be agreed upon within one month after such period of two months.
>
> If either of the contracting parties fails to designate its own arbitrator within two months, or if the third arbitrator is not agreed upon within the time limit indicated, either party may request the President of the International Civil Aviation Organization to make the necessary appointment or appointments by choosing the arbitrator or arbitrators.
>
> The contracting parties will use their best efforts under the powers available to them to put into effect the opinion expressed in any such advisory report. A moiety of the expenses of the arbitral tribunal shall be borne by each party."

Enforcing Labor Arbitration Clauses by Section 301, Taft-Hartley Act

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Confusion abounds as to whether arbitration clauses in collective bargaining agreements may be enforced in the federal courts. By enforcement is meant giving effect to every aspect of the clause by court decree which would a) require parties to proceed to arbitration as required by the clause; b) appoint arbitrators in the absence of agreement of the parties; c) enforce, modify or vacate awards of arbitrators; d) declare the rights of the parties as in an action for a declaratory judgment; e) stay an action pending arbitration provided for in the contract.

It was thought at one time that the Federal Arbitration Act might prove the avenue for the enforcement of arbitration clauses of collective bargaining agreements. This despite the fact that Sec. 1 of that Act excepted "contracts of employment." It had been held by the United States Supreme Court, in a case not involving the arbitration statute, that a collective bargaining contract was not a contract of employment but rather a trade agreement;[1] that court has not had occasion to rule on the specific applicability of the Federal Arbitration Act to collective bargaining agreements. We are left with conflicting decisions in the lower federal courts[2] so that reliance upon those forums for the enforcement of arbitration clauses becomes highly questionable, or at least haphazard. Even assuming that some of those courts will apply the Federal Arbitration Act to collective bargaining contracts,[3] it may be that the application will not embrace enforcement of the the entire clause but will give effect to it only by staying an action pending arbitration.[4]

The vacuum, partial or complete, left by the federal courts in deal-

[1] *J. I. Case Co.* v. *N.L.R.B.*, 321 U. S. 332, 334, 335.

[2] Applicable: *Lewittes & Sons* v. *United Furniture Workers of America*, 95 F. Supp. 851; *United Office & Professional Workers of America* v. *Monumental Life Ins. Co.*, 88 F. Supp. 602; Inapplicable: *International Union United Furniture Workers of America*, 168 F. 2d 33; *Pennsylvania Greyhound Lines v. Amalgamated Ass'n Etc.*, 193 F. 2d 327. See also *Markel Elec. Products Inc. v. UERMW*, 202 F. 2d 435.

[3] See Sturges and Murphy, *Some Confusing Matters Relating to Arbitration under the United States Arbitration Act*, Law and Contemp. Probl. Vol. 17, 580 (1952).

[4] *Kulukundis Shipping Co.* v. *Amtorg Trading Co.* 126 F. 2d 978, 987.

ing with that Act has especially serious consequences in those states in which arbitration clauses of collective bargaining contracts are rarely, if ever, enforcible under state statutes. It was the old common law that a contract to arbitrate future disputes was not specifically enforcible, and that equity would enforce only an executed award. State statutory arbitration has become an effective instrument for the resolution of labor disputes in some states, and more recently a Draft of an Arbitration Act embodying the enforcement of labor-management arbitration agreements had been recommended by the Arbitration Law Committee of the American Arbitration Association.[5] The result has been that, although contracts to arbitrate future disputes are now enforcible in several states, the statutory provisions are patch-work, often inadequate and, of course, lacking in uniformity.

An answer to the problem seems to have been found in Sec. 301 of Title III of the Taft-Hartley Act. That section is sub-titled "Suits By and Against Labor Organizations". In sub-section (a) of that section it is provided that: "Suits for violation of contracts between an employer and a labor organization representing employees in an industry affecting commerce as defined in this Act, or between any such labor organizations, may be brought in any district court of the United States having jurisdiction of the parties, without respect to the amount in controversy or without regard to the citizenship of the parties." We deal here only with arbitration clauses in contracts "in an industry affecting commerce;" in other words, only within the interstate and foreign commerce power of the federal government as exercised in the Taft-Hartley Act.

Most collective bargaining agreements in the United States contain clauses, of varying scope, for the arbitration of disputes between the parties arising out of the operation, application or interpretation of the contract or otherwise arising out of the management-union relationship during the term of the contract. Contracts which contain arbitration provisions invariably provide that the arbitrator's decision shall be final and binding upon the parties. In other words, the decision of an arbitrator, rendered pursuant to a collective bargaining agreement, becomes an addendum to the contract and, by logical and legal necessity, enforcible in the same manner as the other provisions of the contract. It also follows that every other aspect of the arbitration clause should likewise be given effect by the courts, since refusal to comply with any of its provisions, such as proceeding to arbitration, would be a breach of contract.

[5] Text in Arb. J. Vol. 7 (N.S.), p. 201 (1952).

There is only one reported case in which the arbitration clause of a collective bargaining contract was specifically enforced in a federal court pursuant to Sec. 301, *Textile Workers Union of America* v. *Aleo Mfg. Co.*[6] It arose in North Carolina which permits revocation of contracts to arbitrate future disputes at any time prior to the rendition of the award. The employer in that case in effect revoked the arbitration clause as it applied to the specific dispute by withdrawing from the hearing. The arbitrator continued with the hearing in the absence of the employer and awarded[7] reinstatement and back pay for two employees who had been discharged and reinstatement, seniority readjustment and some back pay for other employees who had struck in protest of the discharge of the two; the strike was "wildcat", against the advice and efforts of the union.

Although the case has not been entirely overlooked by commentators,[8] it has not stimulated any similar actions. It would seem, however, to provide a broad avenue for the federal enforcement of all aspects of arbitration clauses contained in collective bargaining contracts in interstate commerce regardless of whether enforcement is sought in a state in which common law or statutory arbitration is ineffective or non-existent.

In the *Aleo* case the court granted a preliminary injunction requiring the employer to reinstate the employees pursuant to an arbitration award which, in turn, was rendered pursuant to a collective bargaining agreement providing that the arbitrator's award should be final and binding. The Court stated that: "The primary purpose of this litigation is to compel defendant to comply with the terms of the agreement." It held that:

1. It had jurisdiction under Sec. 301 to grant specific performance, by injunction, of an arbitrator's award since that section "has created a new substantive right actionable in the federal courts;"
2. the common law and statutory law of North Carolina are inapplicable since Sec. 301 "creates a federal remedy not controlled by state law;"
3. the Norris-LaGuardia Act does not prohibit an injunction requiring an employer to hire an employee;
4. Sec. 301 permits a declaratory judgment (dictum);

[6] 94 F. Supp. 626.
[7] 15 L. A. 715.
[8] Note, Virginia L. Rev. Vol. 37, p. 739 (1951); Fulda, *The No-Strike Clause*, George Washington L. Rev. Vol. 21 p. 127, at p. 140 (1952).

5. the arbitration clause of the contract was broad enough to comprehend disputes over alleged violations of the no-strike clause.

The questions now presented are: What are the chances that the result and reasoning in *Aleo* will be followed by other federal courts? and what special problems will arise in the federal courts if they do take the path pointed by *Aleo*?

Did Congress intend to enforce by Sec. 301 agreements to arbitrate contained in collective bargaining agreements? We can find this intention in the legislative history of the Taft-Hartley Act, in the very terms of that Act, and in other labor legislation.

The Congressional motivation for the enactment of this section was most explicit in the legislative history. Witness after employer witness complained that unions were insufficiently amenable to suits in the states for violations of the no-strike clauses of collective bargaining agreements. Detailed analyses of the inadequacies of the state laws were submitted at the hearings. The committee reports were equally explicit as to the motive for the enactment of Sec. 301. All of the proponents of the section, in and out of Congress, agreed that the only solution to import stability in industrial relations during the term of a collective bargaining contract was by passage of a federal act which would make unions uniformly liable, along with employers, by suit in the federal courts. The declaration of policy of Sec. 201 of the Taft-Hartley Act states in par. (b) that "the settlement of issues between employers and employees through collective bargaining may be advanced by making available full and adequate governmental facilities for conciliation, mediation, and voluntary *arbitration* . . . to reach and maintain agreements . . . and in par. (c) the intention of Congress that the parties should include "within such agreements provision. . . . for the *final adjustment of grievances or questions regarding the application or interpretation* of such agreements. . . ." Other statutes, such as the Railway Labor Act[9] and the Norris-LaGuardia Act,[10] indicate a similar Congressional desire to foster final and binding arbitration. The insertion of final and binding arbitration clauses in collective bargaining agreements by the War Labor Board during World War II, whether or not the parties agreed to such clauses, met with universal approbation.

Since the arbitration clause is the foundation of industrial peace within the collective bargaining agreement, it is inconceivable that

[9] 45 U. S. C. A. Sec. 151 et seq.
[10] 29 U. S. C. A. Sec. 108.

Congress, in enacting Sec. 301, meant to relegate arbitration to the limbo of rights without remedies; it is unthinkable that Congress, which stated and effectuated an intention to prevent violations of collective bargaining agreements, would omit from the application of the statute the most important provision of such contracts. If an arbitration decision which the parties themselves agree shall be binding and conclusive does not become a part of the contract and its violation is not deemed a violation of the contract, then the contract is a wholly illusory instrument that cannot possibly be the basis of industrial peace. Had Congress intended to exclude the most important provision of a collective bargaining agreement from the operation of Sec. 301, we can be sure that there would have been some indication, either in the legislative history or the statute itself, that it intended such an extraordinary result; no such intention is revealed in the terms of the statute or in its legislative history.

If the *Aleo* case will be followed in the federal courts, it is apparent that those courts will be faced with a host of problems that they have not heretofore dealt with in any detail, if at all. Some of those problems can be anticipated by reference to *Aleo* and some by reviewing the manner in which the federal courts have interpreted Sec. 301 generally with respect to enforcement of collective bargaining contracts.

An arbitrator may award reinstatement, placement on a preferential list, seniority readjustment, a pension or welfare plan, reporting pay, back pay, lay-off, wage increase or decrease, workload increase or decrease, conversion from hourly rates to piece rates, safety appliances, damages for breach of the no-strike clause, and innumerable other types of award. How can the failure to abide by those awards be enforced, since the failure to abide by them is a breach of contract? Most of those breaches of contract can not be remedied by a judgment for damages. Most of them require what the courts refer to as "specific performance" of the contract to remedy the breaches. Specific performance of contracts can be achieved, however, only by way of injunction, a term fraught with great emotion in labor relations. There has been some doubt that Sec. 301 permits a remedy by injunction, although that remedy has been granted in several cases[11] under that section in addition to the *Aleo* case. The very use of the term "suits",[12] the first word of the section, without qualification,

[11] *American Federation of Labor* v. *Western Union Telegraph Co.*, 179 F. 2d 535; *Mountain States Division Etc.* v. *Mountain States T. & T. Co.*, 81 F. Supp. 397.

[12] *Weston* v. *Charleston*, 27 U. S. 449, 464.

would seem to support the argument that all types of relief, including injunctive, can be granted. And when we view Sec. 301 in the light of another section, in which the nature of the remedy is qualified, it appears beyond a peradventure that Sec. 301 is unqualified. Sec. 303(a)[13] prohibits certain types of secondary boycotts by unions; it is followed by Sec. 303(b) which provides that whoever is injured by the prohibited boycotts "may sue therefor . . . and shall recover the damages by him sustained and the cost of the suit."[14] When Congress intended to limit the type of relief, it found appropriate language readily available. Had it intended to omit injunctive relief under Sec. 301 it would surely have inserted clarifying or qualifying language as in Sec. 303.

When it is established that the federal courts may issue injunctions to enforce arbitrators' awards in order to remedy violations of collective bargaining contracts, there remain the questions that must usually be asked whenever a court of equity exercises injunctive powers. For example, may injunctions be issued to enforce the type of award which requires an employer to hire or reinstate an employee or which prohibits a strike? The old common law rule that equity may not enforce a contract for personal services by injunction would seem to fall inasmuch as collective bargaining agreements are not contracts of employment but rather trade agreements, *J. I. Case Co.* v. *National Labor Relations Board.*[15] The National Labor Relations Board has often ordered and the federal courts uniformly enforced reinstatement of employees without being concerned with the common law doctrine of enforcing personal services. If the federal courts are not concerned with the common law problems of equity jurisdiction when dealing with the National Labor Relations Board under Title I of the Taft-Hartley Act, they should be equally unconcerned when dealing with the problems of breach of contract arising under Title III.

That does not end the problem of the use of the injunction to enforce awards which require reinstatement. Is there anything in Sec. 20 of the Clayton Act[16] or in Sec. 4 of the Norris-LaGuardia Act[17] which prohibits such an injunction? On their face those sections seem to prohibit injunctions that require the maintenance or the termination of an employment relationship. In the *Aleo* case it was

[13] 29 U. S. C. A. Sec. 187.
[14] *Bakery Sales Drivers* v. *Wagshal,* 333 U. S. 437.
[15] 321 U. S. 332, 334, 335.
[16] 29 U. S. C. A. Sec. 52.
[17] 29 U. S. C. A. Sec. 104.

held that "these sections are limitations on behalf of employees; they have no application to an injunction against an employer. Any statement in the decisions purporting to give the broad construction claimed by the defendant will be found in cases where an injunction was sought by the employer."[18]

An employer is in a different position if he seeks enforcement of a no-strike clause by way of injunction. If an arbitrator should declare a strike to be in breach of a no-strike clause, there seems to be no doubt that a federal court may not enforce such award by injunction, not because injunction does not lie as a remedy under Sec. 301,[19] but rather because an injunction against a strike is prohibited by Sec. 4 of the Norris LaGuardia Act, *Alcoa S. S. Co.* v. *McMahon.*[20]

An injunction has uses in enforcing arbitration clauses in addition to its use to enforce an award. It makes almost every aspect of the arbitration clause subject to judicial enforcement. If one party refuses to proceed to arbitration, injunction may be used to compel arbitration and acts incidental thereto. Conversely, if one party believes that arbitration is being demanded outside the scope of the arbitration clause, injunction may be sought to restrain the arbitration proceeding. Additional enforcement of an arbitration clause may be effected, tangentially, by a motion for a stay, actually an injunction, to prevent further judicial proceedings pending arbitration in accordance with the arbitration clause of the contract.

Judgment for damages on an arbitration award involving breach of a collective bargaining contract is rare except in those cases that an award is made to an employer for breach of a no-strike clause or to a union for loss of dues. The usual arbitration awards requiring payment of money are in cases involving back pay or future wage increases. Such awards would not be "damages" to any party to the contract and, consequently, would seem to be enforcible only by injunction.

Declaratory judgment[21] is a remedy that was approved in the Aleo and other[22] Sec. 301 cases. It can have great utility in cases involving the arbitration clause of a collective bargaining contract. The scope

[18] *United States* v. *Hutcheson,* 312 U. S. 219, 235, 236, emphasizes that both of those Acts must be read together to "protect the rights of labor." It is advisable, however, to plead and prove the jurisdictional requirements of the Norris-LaGuardia Act.

[19] Most state courts will enforce a no-strike clause by injunction.

[20] 173 F. 2d 567, cert. den. 338 U. S. 821.

[21] 28 U. S. C. A. Sec. 2201.

[22] *Studio Carpenters Local Union* v. *Loew's Inc.* 84 F. Supp. 675; *Alcoa S. S. Co.* v. *McMahon,* 173 F. 2d 567.

of the arbitration clause can frequently be litigated by this procedure, sometimes accompanied by demand for an injunction.[23] It can also be used in seeking to vacate an arbitration award on the theory that a refusal to comply with an award would be a breach of contract and that the plaintiff seeks an interpretation as to whether the award, being beyond the powers of the arbitrator or otherwise improper, is to be considered as a part of the contract.

Declaratory judgment or motion to stay an action pending arbitration are appropriate proceedings in which to seek a clarification of any conflict between the no-strike clause and the arbitration clause. In *International Union United Furniture Workers* v. *Colonial Hardwood Flooring Co.*,[24] a motion to stay an action for damages for breach of the no-strike clause was made on the ground that a claim for damages for breach of that clause was an arbitrable matter. The court held that the arbitration clause was not sufficiently broad in scope to include such a dispute and that a motion to stay, made under the Federal Arbitration Act, was improper because that Act was inapplicable to arbitration or any other clauses of collective bargaining contracts. The contrary result was reached in *Lewittes & Sons* v. *United Furniture Workers of America*,[25] holding that the arbitration clause included disputes arising out of violations of the no-strike clause and that a motion to stay pending arbitration could be entertained under the Federal Arbitration Act. In neither of those cases was it urged that a motion to stay could be granted under Sec. 301, although the plaintiffs in both of those cases sued under Sec. 301 for breach of contract. In the *Aleo* case, however, it was held that Sec. 301 was applicable to arbitration clauses of collective bargaining contracts and that the particular arbitration clause embraced disputes concerning violations of the no-strike clause. It is doubtful that the federal courts will feel called upon to go as far as the New York courts in such cases as *Publishers Association of New York* v. *Newspaper and Mail Deliverers Union*,[26] holding that despite an agreement allowing an arbitrator to award punitive damages, the award for punitive damages would not be confirmed because the New York courts are without power to award such damages for breach of contract. There may soon be a federal common law of arbitration contract interpretation in order to deal with those questions which usually arise in states under common law or statutory arbitration

[23] 28 U. S. C. A. Sec. 2202.
[24] 168 F. 2d 33.
[25] 95 F. Supp. 851.
[26] 280 App. Div. 500.

when the scope of the arbitration clause or of the powers of the arbitrator are called into question.

It is not our intention here to discuss the question as to whether Section 301 has preempted the field of enforcement of collective bargaining agreements, and thus rendered state arbitration statutes inapplicable, in all cases involving interstate commerce. We can be sure, however, that in all cases involving interstate commerce, actions to enforce collective bargaining agreements brought in state courts may be removed to the federal courts;[27] it would seem to follow that actions in the state courts to confirm, vacate or modify arbitrators' awards are likewise removable.

Unless the forthcoming amendments to the Taft-Hartley Act radically change Sec. 301, (of which there seems to be no indication at the present time) we may expect more frequent use of federal courts to enforce arbitration clauses in collective bargaining contracts.

Ed. Note: After the above article had gone to print, two decisions of federal courts expressed the viewpoint set forth by the authors, namely, that art. 301 of the Taft-Hartley Act authorizes the enforcement of arbitration clauses in collective bargaining agreements and of awards rendered thereunder. The decisions of the Court of Appeal, Sixth Circuit (Ohio), in *Milk & Ice Cream Drivers & Dairy Employees Union, Local No. 98 v. Gillespie Milk Products Corp.*, 203 F. 2d 650, and of the District Court, Massachusetts, in *Textile Workers Union of America, C.I.O. v. American Thread Co.*, 21 U. S. Law Week 2606, are digested on page 101 of this issue.

[27] *Fay* v. *American Cystoscope Makers*, 98 F. Supp. 278.

Japanese Arbitration Law

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On September 16, 1952, the Japan Commercial Arbitration Association and the American Arbitration Association entered into an agreement for the purpose of facilitating the use of commercial arbitration in trade between Japan and the United States.[1] As a result, a closer relationship between the traders of the two nations has been established, which, together with the increased amount of commercial activity between them, intensifies the need for additional insights into at least some facets of their respective internal legal systems. On the theory that an awareness of Japanese arbitration procedures may well serve to reinforce the potential trader's knowledge of his role in relation to that of the Japanese merchant, some of the more salient aspects of Japanese arbitration practice merit consideration.

By reason of the Occupation of Japan after the end of hostilities in World War II, Japan's legal system underwent considerable revamping; a new Constitution, and new, if not amended, legal codes were introduced. One of the more recently adopted schemes is the Code of Civil Procedure of 1950, Book VIII of which is devoted to "Arbitration Procedure." There are ninteen articles in this book, and they deal with such diverse topics as jurisdiction, nomination of arbitrators, hearings and examination of parties and witnesses, enforcement of awards, challenge thereof, and relief in arbitration and ensuing court proceedings.

Under the Japanese Code, an agreement for submission of a controversy to arbitration is valid only insofar as the parties are empowered to compromise with reference to the subject matter (art. 786). This provision operates so as to effectively deny jurisdiction to a panel unless the parties to the submission agreement are the real parties in interest. In line with the same principle is the provision of Art. 787 which reads as follows:

> "An arbitration contract in regard to future controversies has no effect where is is unrelated to an established legal right and dispute arising therefrom."

This would mean that as between A and B who have entered into an agreement for the sale of rice to be delivered on March 1, time

[1] See this *Journal* 1952, p. 151, 237.

being of the essence, a pre-existing agreement to arbitrate concerning something other than the time factor would be ineffective unless the contract unquestionably established a right to arbitrate the particular matter in question. Since the buyer does acquire a legal right to receive the rice on March 1st however, arbitration might be had in connection with the delivery date or a "dispute arising therefrom", if, of course, arbitration was provided for. The question is what is "an established legal right", or a "determined relation(s) of right". It would appear to refer to rights arising by operation of law or *ex contractu,* but, as we know, it is sometimes necessary to refer to the facts before it can be determined that legal rights exist. It is therefore a somewhat ambiguous provision, over which dispute could easily result, except where the so-called right was unquestionably established.

The nomination of one or more arbitrators may be provided for in the agreement, but in the absence of a provision of this nature, the Code directs that each of the parties to a dispute may nominate one arbitrator. The party first nominating is obliged to signify to his adversary in writing the name of the arbitrator he has selected, calling upon the other party to do the same within seven days. If this request goes unheeded, a competent court, on application of the initiating party, may do so (art. 788, 789). Having once named an arbitrator, a party is bound by such nomination after he has given the other party notice of the nomination (art. 790). Where an arbitrator dies, or for some other reason is precluded from acting, the party who nominated him shall appoint a substitute within seven days after demand. As is the case where the arbitrator is not named within the seven day period by a defaulting party, failure to nominate a substitute within seven days justifies nomination by the court of a substitute, provided that a demand for such nomination has been first made (art. 791). The nomination of arbitrators may be had pursuant to arbitration rules to which the parties have agreed as, e.g. by reference to rules under the Japan-American Trade Arbitration Agreement.

Either party to an arbitration proceeding may refuse to permit an arbitrator to act. The statute states that such refusal may be based "on the same grounds and under the same conditions as they could reject a judge" (art. 792), but while the sole grounds for the refusal of a judge are circumstances . . . such as are calculated to prejudice impartiality,[2] the reasons for which a judge may be ex-

[2] Article 37 (Book One, Chapter One, Section Two)

cluded from the exercise of his functions by operation of law are several in number.[3] Improper delay in the performance of duty, as well as incapacity and previous deprivation of civil rights, may also serve as grounds for refusal of an arbitrator (art. 792). Where designated arbitrators fail to participate because of death, or for any other reason, the statute declares the arbitration agreement to be inoperative, unless the agreement anticipated such contingency and designated an alternate. So too, failure of the parties to agree on the arbitrator is sufficient ground for considering the agreement inoperative (art. 793).

Arbitrators, once having been appointed and deemed qualified, are obliged to hear the parties and make such inquiries into the circumstances of the controversy as they may consider necessary; unless otherwise provided, rules for the inquiry may be determined in the discretion of the arbitrators (art. 794). While arbitrators may examine the witnesses, lay and expert, who appear before them, they are not empowered to administer the oath to them (art. 795). This is a function reserved to judicial officers, who may be applied to for assistance. Thus, where acts need to be performed, and the arbitrators are legally not qualified to perform such acts, application has to be made to the Court (art. 796). The rule of the majority prevails where an award is to be made by several arbitrators, unless, of course, the rules which are referred to in the arbitration agreement provide otherwise (art. 798). An award must be dated and signed and sealed by the arbitrators, and a signed and sealed copy must be served on each of the parties; the original is deposited with the competent court with proof of service annexed (art. 799).

An arbitration award is regarded as having the same force and effect as a final judgment of a Japanese Court of Justice (art. 800). To set aside an award, application may be made, provided it is supported by one or more of the following grounds: (1) inadmissible evidence was received, (2) the award requires performance of an illegal act, (3) representation of one or both parties was improper, (4) one or both parties were not afforded an opportunity to be heard, (5) the award was not accompanied by reasons, (6) a participating

[3] Article 35 provides for exclusion (a) if the judge or his spouse or former spouse is a party to the case or is related to a party in the case as a creditor, debtor or surety, (b) if the Judge is or was a blood relative within the fourth degree of consanguinity, or related by marriage within the third degree of relationship of a party or relative with whom a party resides, (c) if the Judge is the guardian or custodian of a party, (d) if the Judge has testified as a witness in the case, (e) if the Judge represented a party to the case, (f) if the Judge has participated in the same proceeding at any previous time.

arbitrator was guilty of malfeasance in the particular case, (7) one of the parties was denied an opportunity to properly present its case, (8) evidence on which the award was based was forged or altered in a fraudulent manner, (9) the award was based upon the false testimony of a witness. In the event the parties waive by agreement the requirements of numbers 4 and 5 above, the award, of course, cannot be set aside for these reasons (art. 801, 420).

A Japanese court is generally one of any of four types, the equivalent of which may be roughly termed summary courts, district courts, high courts and the supreme court. In arbitration proceedings, the summary or district court is the court deemed competent for the purpose of exercising judicial functions such as nomination or exclusion of arbitrators, termination of an agreement, passing upon evidence, annullment of an award, or the rendering of a judgment. This court is usually designated in the agreement to submit to arbitration. In the absence of any such designation, the court that would be competent if the claim was brought to ordinary court proceedings would have jurisdiction. As between two or more courts that are competent, the court to which the parties have first addressed themselves is the appropriate one (art. 805).

Japanese statutory arbitration law will, as it appears from the foregoing, provide a very good foundation for the practical use of arbitration as a means of settlement of commercial disputes between the traders of different countries, so essential to the development of favorable international trade relations.

Ed. Note: This article on Japanese arbitration law deserves special attention inasmuch as the Japan-American Trade Arbitration Agreement of September 16, 1952 (text in *Arb. J.* 1952, p. 151) has recently been implemented by the establishment of the two Joint Arbitration Committees in Tokyo and New York and of international panels about which details will be published in a forthcoming issue of the Arbitration Journal.

Japanese lawyers interpret Art. 786 of the Japanese Code of Civil Procedure to the effect that future arbitration clauses—providing for the settlement of disputes thereafter arising—are enforceable, since that article had been adopted from the German Code of Civil Procedure of 1877, art. 1026, reading as follows: "An agreement to arbitrate future disputes is not valid in law unless it refers to a definite legal obligation and to disputes arising therefrom."

It is interesting to note further that the recent Treaty of Friendship,

Commerce and Navigation between the United States and Japan, which was signed in Tokyo on April 2, 1953, provides for the enforcement of commercial arbitration agreements and the execution of awards in both countries. Its art. IV(2) reads as follows:

> "Contracts entered into between nationals and companies of either Party and nationals and companies of the other Party, that provide for the settlement by arbitration of controversies, shall not be deemed unenforceable within the territories of such other Party merely on the grounds that the place designated for the arbitration proceedings is outside such territories or that the nationality of one or more of the arbitrators is not that of such other Party. Awards duly rendered pursuant to any such contracts, which are final and enforceable under the laws of the place where rendered, shall be deemed conclusive in enforcement proceedings brought before the courts of competent jurisdiction of either Party, and shall be entitled to be declared enforceable by such courts, except where found contrary to public policy. When so declared, such awards shall be entitled to privileges and measures of enforcement appertaining to awards rendered locally. It is understood, however, that awards rendered outside the United States of America shall be entitled in any court in any State thereof only to the same measure of recognition as awards rendered in other States thereof."

Sir Lynden Macassey of London, England, sent the following communication on an important decision of the English Court of Appeal in regard to arbitration, of March 4, 1953, in *David Taylor & Son, Ltd. v. Barnett Trading Co.,* (1953) 1 All England Law Reports 843, (1953) 1 Weekly Law Reports 562:

"By a contract in writing dated 27th February, 1952, a seller agreed to sell and a buyer agreed to buy a large number of cases of Irish stewed steak at 2/4d. per pound, delivery to be between April and July 1952. At the time the contract was made there was in force a Government order which had the force of law prohibiting the purchase or sale of any such meat at a price exceeding 2/0¾d. per pound. Shortly after the contract was made another Government order dated 16th March, 1952, came into operation increasing the legal maximum price to 2/4d. per pound. The seller failed to make delivery and the buyer referred to arbitration under provisions to that effect in the contract the question of the seller's default.

On the matter being referred to arbitration of two arbitrators, one appointed by each side, who in accordance with English arbitration law appointed an umpire, the umpire made an award that the seller should pay to the buyer the sum of £11,000, and that the costs of the arbitration should be paid by the seller.

The buyer applied to the High Court of England for an order enforcing the award, which was opposed by a counter application by the seller that the award was bad inasmuch as that the umpire had misconducted himself in law in failing to take into account the illegality of the contract at the time it was made.

The matter came before the Lord Chief Justice of England, who refused to hold that the award was bad, and refused the motion to set it aside, whereupon the seller appealed to the Court of Appeal.

The Court of Appeal held that inasmuch as the contract of sale provided for a price which was illegal at the time the contract was made the contract was an illegal contract, and that its illegality was not remedied by the fact that the legal price had been raised to the price in the contract before delivery had taken place, the Court holding that the contract being illegal *ab initio* made the contract illegal from start to finish. The Court of Appeal held that it was the duty of the umpire to decide the question submitted to them according to the legal rights of the parties, and that he had no right to consider what was fair and reasonable under the circumstances as they might be altered from what they were when the contract was entered into. The Court of Appeal accordingly allowed the appeal and set the award aside."

REVIEW OF COURT DECISIONS

THIS review covers decisions in civil, commercial and labor-management cases, arranged under the main headings of: I. *The Arbitration Clause,* II. *The Arbitrable Issue,* III. *The Enforcement of Arbitration Agreements,* IV. *The Arbitrator,* V. *Arbitration Proceedings,* VI. *The Award.*

I. THE ARBITRATION CLAUSE

Order forms for the sale of standard Canadian newsprint sheets with the standard AAA clause contained a statement requesting that an attached confirmation copy be signed and returned within a week, otherwise the seller would reserve the right to cancel the orders. The buyer acknowledged receipt of the orders by letter and later returned them, attaching "flags" containing language commonly known as the "force majeure clause," to which the seller did not object. In affirming Special Term, which had directed arbitration, since "it appears conclusively that there were binding contracts as to the four orders in dispute," the Appellate Division stated that "the request for a confirmation was not a condition but may be looked upon as for record purposes only," and the Court of Appeals affirmed the order directing arbitration. *Bristol Paper Products, Inc. v. Amexim po, Inc.,* 305 N.Y. 569.

A sales contract with an agency of the Government of India contained a clause stating that the contract was "placed in accordance with the conditions of the contract form, ISM 826 rev." That form provided in paragraph 25 for arbitration under the standard AAA clause. Said the court, denying a motion to stay arbitration: "In view of the reference to form ISM 826 revised, which, when integrated, forms the contract executed by the buyer and seller, the contention that no contract to arbitrate exists between the parties is at variance with the plain language of the agreement (*Level Export Corp. v. Wolz, Aiken & Co.,* 305 N.Y. 82 [digested *Arb. J.* 1953, p. 45])." The court further held that the question as to whether a warranty had expired and therefore the right to arbitration terminated, is a matter for the arbitrators to decide, referring to *Unsinn v. Republique Francaise,* 281 App. Div. 738, 117 N.Y.S. 2d 801 (digested *Arb. J.* 1953, p. 48). *Am. Rail & Steel Co. v. India Supply Mission* (*Government of India*), N.Y.L.J., April 28, 1953, p. 1410, Botein, J.

When a contract incorporates by reference "the rules, laws and regulations of the Local," which are made "part of this contract" and which provide for arbitration of claims or disputes arising out of the contract, a party is bound to arbitrate even if it was never furnished with a copy of the incorporated rules. Referring to *Level Export Corp. v. Wolz, Aiken & Co.,* 305 N.Y. 82, the court, in directing arbitration, said: "Before a party signs a contract which incorporates by reference a document which he does not see, he has been alerted that there are obligations other than the provisions of the visible contract to which he may be binding himself. Accordingly, sound business policy would dictate that he

request a copy of the incorporated matter, or sign the contract and assume the obligations about which he is in ignorance, at his own risk." *Weiner v. Mercury Artists Corp'n,* N.Y.L.J., May 18, 1953, p. 1658, Hecht, J.

A fine-print provision referring to "Cotton Yarn Rules" was not considered sufficient to submit a party to arbitration under the rules of the General Arbitration Council of the Textile Industry (281 App. Div. 831, 118 N.Y.S. 2d 569, digested *Arb. J.* 1953, p. 47). That decision, however, was reversed on reargument, since the Court of Appeals had meanwhile reversed the determination in *Level Export Corp. v. Wolz, Aiken & Co.,* 305 N.Y. 82, digested *Arb. J.* 1953, p. 45. In relying on that decision the App. Div. affirmed an order that the controversy proceed to arbitration. A dissenting opinion by Adel, Acting P.J., in which Beldock, J., concurred, stated that the scant general statement in the contract was "substantially different from the fully explicit statement [in the contract] in the *Level Export* case," and thus presented "a question of fact as to whether the buyer, at the time of the making of the contract, had knowledge or is chargeable with knowledge of the provisions of the 'Cotton Yarn Rules' and of the fact that they compelled arbitration." *Riverdale Fabrics Corp. v. Tillinghast-Stiles Company,* 281 App. Div. 983, 121 N.Y.S. 261 (2d Dept.).

A charter party entered in London between a Louisiana company and an Italian corporation provided for "arbitration to be settled in London." On a claim for damages to a cargo of paper bags because of contact with sea water, arbitration was resisted on the "vague and nebulous" character of the arbitration clause. Since Sec. 3 of the Federal Arbitration Act applies also to contracts for arbitration to be held in a foreign country (*Uniao De Transportadores v. Companhia de Navegacao,* 84 F. Supp. 582, digested *Arb. J.* 1949 p. 225), the court held that the interpretation to be given to the arbitration clause agreed upon in London was to be that of British law rather than the law of this country. Though no case, either British or American, could be furnished dealing with an arbitration clause phrased in the language here used, the court held that "an arbitration clause is to be given the broadest possible interpretation as to the subject matter," and granted the motion to stay the trial until arbitration of the issues was held in accordance with the arbitration clause. *Fox v. The Giuseppe Mazzini,* 110 F. Supp. 212 (D.C., E.D.N.Y., Galston, D. J.).

A contract for the sale of tomato paste, then aboard a certain vessel, was claimed to be invalid, since after payment and delivery the tomato paste was condemned by the U. S. authorities and its export or destruction was ordered. The court held that the respondent's position that the contract was tainted by illegality, hence no contract, and therefore there could be no arbitration under the clause contained in the contract, was not well taken. Said the court: "There was nothing illegal about the contract. It is conceded that there is no element of fraud. There was a mistake of fact about the subject matter. But it was not the intent of the parties to do an illegal act nor did the contract call for one. The situation presents a question of law, possibly simple of solution, as to where the risk of loss is on such a sale. The contract provides for the resolution of that question by arbitration." *L. N. White & Co., Inc. v. Stern, Morgenthau & Co., Inc.,* N.Y.L.J., May 14, 1953, p. 1622, Steuer, J.

After the receipt of a notice of arbitration, a company informed the arbitrator that it denied the existence of a contract between the union and itself and that there was therefore no authority for the arbitrator to determine the alleged claims. The arbitrator informed the company's attorney that unless a stay was obtained the arbitration would proceed. In the absence of the company, the arbitration proceeded and the arbitrator found a sum due and owing to the union from the company. An application to confirm the award was held in abeyance pending the trial of the issue of the existence of the agreement under which the arbitration was held. Said the court: "It has long been held that if a party denies the existence of a contract for arbitration, due process requires that such party be given the right to determine that issue in court (*Finsilver v. Goldberg, Maas & Co.*, 253 N.Y. 382)." *Hiller v. Bebell,* N.Y.L.J., May 11, 1953, p. 1569, Hecht, J.

A contract for the sale of goods, signed in February 1952, contained above the signature the words "This order is subject to the terms and conditions printed on the reverse side of this sheet." These provisions, embodying an arbitration clause, also provided for arbitration "of any controversy arising out of any future dealings between the parties." The buyer, the court said, "thereby had its attention called to these conditions and it is chargeable with knowledge of them regardless of whether it read them or not." Arbitration was further challenged on the ground that it could only be made the subject of a particular contract, and not of any future dealings. The court, however, directed arbitration concerning goods which were sold in April 1953, in saying, "this question should not be confused with an oft litigated one, as to what controversies a particular clause embraces. This is a matter of the interpretation of what the parties did contract for, as distinct from what they might have, had they chosen to." *Hurwitz v. Defender Textile Corp'n,* N.Y.L.J., May 20, 1953, p. 1695, Steuer, J.

An oral demand by the union's president that the employer put two additional union members on its payroll on a weekly basis, is not sufficient to indicate the nature of the dispute. A motion to stay arbitration was granted when the union submitted no other papers than a General Agreement (with an arbitration clause) which disclosed that the employer hires one member of the union. Said the court: "It would appear that, not knowing the question which the union seeks to arbitrate, the petitioner is within his rights to resist arbitration on the ground that he is under no duty 'to arbitrate unless by clear language he has agreed to do so' (*Edgar Const. Corp'n v. Ward Foundation Corp'n,* 255 App. Div. 291)." *Lundy Packing Co. v. Highway & Local Motor Freight Drivers, Dockmen and Helpers Local Union, No. 707, I.B.T.,* N.Y.L.J., April 30, 1953, p. 1446, Hecht, J.

II. THE ARBITRABLE ISSUE

A property-owners' association in Westchester County provided in its by-laws that "any member taking exception to the ruling of the chair, Board of Directors or majority of the membership may appeal to an impartial arbitrator agreed upon by mutual consent." A member claimed that the corporation and its officers had engaged in subversive activities and instituted a court action to enjoin them, whereupon the officers and directors of said membership corporation claimed that

such controversy within the corporation comes within the arbitration provision of the bylaws. The court held that the question before it, namely, whether the provision on arbitration in the bylaws can and does provide for arbitration of the disputes set forth in the claim (subversive activities), cannot be decided on motion papers. Said the court: "The intent of the bylaw was apparently to provide that differences within the corporation should be settled by arbitration rather than litigation. But it uses the permissive word 'may' rather than the imperative 'shall'. What the intent was in this matter is not clear." The motion was therefore referred to a special referee for a hearing and report. *Posner v. Mandel,* N.Y.L.J., May 11, 1953, p. 1578, Gallagher, J.

"A dispute as to an employer's right to shift checkers is a dispute or controversy as to the interpretation or application of an agreement which covers the work of tallying and checking all deepwater cargo," was the statement of the court in directing arbitration. *Isthmian SS. Co. v. Ryan,* N.Y.L.J., April 15, 1953, p. 1246, Walter, J.

A disagreement over the manner of transfer of listings and whether a party is required to transfer his personal identification or certification in connection therewith, was considered a matter properly one for arbitration under a clause (paragraph thirteen) in a contract providing that "any controversy, dispute, disagreement or claim arising out of or relating to this agreement" be settled and determined by arbitration. "Moreover," said the court, "regardless of the manner in which petitioner is required to assign or transfer the listings, the matter relates back to paragraph sixth of the agreement, which requires him to do so in some fashion contemplated by the parties. Consequently, paragraph thirteenth [arbitration clause] of the agreement applies." *Eisenstat v. Metal-electrics, Inc.,* N.Y.L.J., April 24, 1953, p. 1371, Hecht, J.

Diversion of funds by a partner is properly within the jurisdiction of arbitrators under a broad arbitration clause in a partnership agreement. A suit against the partner and a corporation controlled by him to which latter funds were allegedly diverted prior to the making of the partnership agreement, will be stayed until arbitration be had. *Gutwirth v. Carewell Trading Corp'n,* N.Y.L.J. May 14, 1953, p. 1623, Schreiber, J.

A charter party for a cargo of steel plates, to be carried from Japan to Canada, provided for the arbitration of any dispute by three persons ("commercial men") and that the amount in dispute be placed in escrow at New York subject to the decision of the arbitrators. The vessel loaded cargo of steel pipe at San Francisco, carried it to Venezuela, and then proceeded to Montreal. The charterer claimed that having hired the entire ship, it was entitled to the freight received by the owner for the carriage of the steel pipe to Venezuela, whereas the owner urged that the charter party did not reserve the full reach of the vessel to the charterer but only so much thereof as was required to load the tonnage of steel plates specified in the charter party. This dispute was considered such a one as the parties had agreed to settle by arbitration and the court accordingly directed the owner to proceed to arbitration. *Associated Metals & Minerals Corp'n v. Societa Anonima Importazione Carboni E Navigazione Savona,* 111 F. Supp 77 (S.D. N.Y., Sugarman, J.).

A stipulation between union and employer provided that a certain employee should be reinstated in the screwdriver department "on probation," and that if the employer claimed that the employee's production average fell below a certain standard, the matter was to be submitted to a named arbitrator, being given authority to determine how the dispute should be resolved. An order denying a motion to stay arbitration was affirmed, on the ground that the stipulation, as the App. Div. said, did not "show an intention to impose limitations on the authority of the arbitrator. ** It is within the province of the arbitrator to determine how the dispute should be resolved if he finds that Pagan failed to comply with the standards required in the stipulation, whether by transfer of Pagan to another department, by discharge, or other disposition." *Fay, as President of Local 475, United Electrical, Radio & Machine Workers of America v. Signal-Stat Corp.*, 281 App. Div. 907, 120 N.Y.S. 2d 130 (Second Dept., March 30, 1953).

An association of hotel operators entered a supplemental agreement with a council of trade unions, representing workers in the hotel industry, to the effect that employers would pay a percentage of weekly wages into a pension fund. A restaurant operator, an association member, refused to make such pension payments; served with a demand for arbitration, he contended that the association acted beyond the scope of its authority in agreeing to create a pension fund under a clause which was designed only to effectuate modifications of wages or hours. The court, however, held that the pension fund was embraced within the wage and hour revisions contemplated by the parties, specifically as prior dealings between the association and the council dealt with fringe benefits such as welfare and medical center plans. Said the court: "The course of dealing through the years and concurred in by the petitioner constitutes affirmation of the interpretation placed upon the reopening clause by the association and respondent (*Matter of Mencher*, 276 App. Div. 556). Therefore the association, as a negotiating party, had the authority to enter into the pension fund supplemental agreement on behalf of the petitioner." *Alamac Restaurant, Inc. v. Rubin, as President of New York Hotel Trades Council, A.F.L.*, 203 Misc. 463, 119 N.Y.S. 2d 498, unanimously aff'd 281 App. Div. 1016, 121 N.Y.S. 2d 272.

III. THE ENFORCEMENT OF ARBITRATION AGREEMENTS

Challenge of a contract containing an AAA clause as invalid because of usury requires a trial of that very question, since, as the Appellate Division said, "the question of usury which is alleged to invalidate the contract, may not summarily be disposed of" (280 App. Div. 887, 115 N.Y.S. 2d 652). A motion for leave to appeal was dismissed upon the ground "that the order does not finally determine the proceeding within the meaning of the Constitution." *Schoeffer v. Lowell Adams Factors Corp.*, 305 N.Y. 565.

Determination of New York City as the place of arbitration in a dispute between a New York and a Philadelphia corporation, pursuant to Rule 10 of AAA Commercial Arbitration Rules, was recognized as binding upon the parties. In confirming the award the court said: "The arbitration was properly held pursuant to the contract between the parties and the locality of the hearings

was fixed in accordance with the rules which govern." *Maple Yarn Mills, Inc. v. London Knitting Co., Inc.*, N.Y.L.J., May 12, 1953, p. 1589, Hecht, J. Note: This decision is in line with *Bradford Woolen Corp. v. Freedman*, 189 Misc. 242, 71 N.Y.S. 2d 257 (1947), and *Tarrant Co. v. Consolidated Chemical Corp.*, N.Y.L.J., Jan. 27, 1949, p. 334, Hecht, J., aff'd without opinion, 275 App. Div. 918, 90 N.Y.S. 2nd 672 (1st Dept. 1949).

A stockholder's agreement containing an arbitration clause was challenged as unenforceable because of invalid limitations placed on the rights of directors and stockholders of the corporation, the dissolution of which was one of the subjects of the arbitration. The respondents, relying on *Clark v. Dodge*, 269 N.Y. 410, contended that stockholders of a small closed corporation holding the total outstanding shares of stock may legally obligate themselves in advance to take certain action as stockholders with reference to the corporation. The court denied a motion to stay arbitration, and granted a cross-motion to compel arbitration, saying: "The respondent requests arbitration to compel petitioners to abide by the agreement to dissolve the corporation. Since the agreement clearly provides for dissolution of the corporation upon a certain contingency, and it appearing that the event has come to pass, he is within his rights to make the demand. Moreover, the dissolution of the corporation being an arbitrable matter, there is no reason why arbitration should not be directed." *Hega Knitting Mills, Inc. v Aschkenasy*, N.Y.L.J., May 27, 1953, p. 1783, Hecht, J.

Time limitation of one year from the filing of a "Certificate of Final Acceptance" was included in a construction contract which further provided for a time limit of ten days for demanding arbitration after the failure of the owner to decide upon a claim within thirty days after the claim had been filed. Whether, as claimed by the owner, a certain agreement later executed by the parties is the equivalent of a Certificate of Final Acceptance or in the nature or form of a claim, is a matter not to be decided by the court, which "has no jurisdiction to decide issues of this nature on this application" to compel arbitration, which was granted, under the authority of *Lipman v. Haeuser Shellac Co.*, 263 App. Div. 880, 32 N.Y.S. 2d 351, aff'd 289 N.Y. 76. *Caristo Construction Corp. v. Municipal Housing Authority for the City of Yonkers*, N.Y.L.J., June 11, 1953, p. 1973, Kleinfeld, J.

Adjudication under sec. 45 of the Bylaws of the New York Coffee and Sugar Exchange of a dispute between members, was considered an action which should not be interfered with upon a motion to stay under sec. 1458(2) C.P.A., "regardless of whether applicable sections of the by-laws of the Exchange be deemed to provide for statutory or common law arbitration," said the App. Div. in unanimously confirming the order (digested *Arb. J.* 1953, p. 56). *Blanco v. Farr & Co.*, 281 App. Div. 1012, 121 N.Y.S. 2d 265.

A union is the proper party to institute proceedings under an arbitration agreement providing for the designation of arbitrators by the employer and the union. The latter alone, and not the employees, may move to compel an

employer to proceed to arbitration of claims of a group of employees even though the recovery, if any, will be the property of the particular employee involved. *American Radio Ass'n., C.I.O. v. American Export Lines, Inc.*, 19 LA 634 (N.Y. Sup. Ct., Nathan, J.).

Quoted excerpts from a collective bargaining agreement will not be sufficient in proceedings to compel arbitration where the respondent asserts that a reading of the entire collective agreement will disclose that the arbitration clause is inapplicable to the causes of action set forth in a court action in the City Court. *Moskowitz v. Phillips*, 20 LA 148 (N.Y. Sup. Ct., Eder, J.).

An injunction was sought against a corporation to prevent it from violating a collective bargaining agreement with the union by its refusal to abide by and give effect to an award of a duly-constituted arbitrator who had directed reinstatement, with back pay, of certain employees of the company. The District Court for the Southern District of Ohio dismissed the complaint of the union on the ground that the injunction must be denied by compulsion of the Norris-LaGuardia Act, but the order of dismissal was reversed and the cause remanded for trial on its merits. The Court of Appeals held that the unqualified use of the word "suits" in sec. 301(a) of the Taft-Hartley Act—which provides for jurisdiction of federal district courts in suits for violation of collective bargaining agreements in any industry affecting commerce as defined in the Act—authorizes injunctive process for the full enforcement of the substantive rights created by the aforementioned section of the Act. The court referred for this opinion to its own decision in *American Federation of Labor v. Western Union Telegraph Co.*, 179 F. 2d 535, regarding an injunction against the company from violating a pension plan, and to *Textile Workers Union v. Aleo Manufacturing Co.*, 94 F. Supp. 626, where the Federal District Court, North Carolina, had enforced an arbitration award pursuant to that provision of the Taft-Hartley Act. *Milk & Ice Cream Drivers & Dairy Employees Union, Local No. 98 v. Gillespie Milk Products Corp.*, 203 F. 2d 650 (C.A. Sixth Circuit, April 11, 1953).

Specific performance to submit a claim for separation pay to arbitration was refused by the company, contending the claim was not arbitrable. In the union's action under sec. 301 of the Taft-Hartley Act to order the company to arbitrate, the court considered the question as to when the employees were in fact separated from employment as a factual issue plainly arbitrable under the contract, which provided for the arbitration of "any . . . controversy of any nature . . . between the Union and the Company," only excluding from arbitration "questions involving changes in the . . . provisions of this Agreement." Moreover, issues as to the meaning of the terms of the contract, said the court, "are also arbitrable, for the parties have excluded from arbitration only changes in the terms and provisions of the contract." As to the further challenge by the company that the court lacked the power specifically to enforce an arbitration provision in a collective bargaining contract, the court did not decide the question whether federal courts acting under sec. 301 of the Taft-Hartley Act are to apply federal or local law to determine the rights of the

parties since "under either so-called federal common-law or under Massachusetts law this contract to arbitrate is valid and creates rights in the parties." In considering legislative language and the history of sec. 301, the court reached the conclusion that in suits under that section federal law directs the specific performance of arbitration clauses, and held the Norris-LaGuardia Act of 1932 not applicable to cases "where mandatory injunction is sought to enforce a contract obligation to submit a controversy to arbitration under an agreement voluntarily made," referring among other cases to *Milk & Ice Cream Drivers,* 203 F. 2d 650, and *Aleo Manufacturing Company,* 94 F. Supp. 626. Said the court: "One of the very objects of the statute (sec. 8 of the Norris-LaGuardia Act) was to induce the parties instead of promptly going to court for broad injunctions hastily issued, restraining tortious or other conduct, first 'to make very reasonable efforts to settle such disputes . . . by voluntary arbitration. Section 8 of the Norris-LaGuardia Act, 47 Stat. 72, 29 U. S. Code sec. 108.'" *Textile Workers Union of America, C.I.O. v. American Thread Co.,* U. S. District Court, Mass., 21 U. S. Law Week 2606, Civil Action 52–503, June 5, 1953, Wyanski, J.

Termination of a collective bargaining agreement does not in itself bar the arbitration of a claim for which the employee did not give timely notice of grievance or exhaust his remedies under the contract. Said the court: "In the absence of an arbitration clause the employee could have brought suit and the fact that the contract period had passed would have been no bar to the suit. The arbitration clause provides a substitute method of obtaining redress. That method is available for just as long as claims arising under the contract may be pursued. A different situation would be presented if the arbitration clause itself or the contract provided other means for determining limitations." *Commercial Telegrapher's Union v. King Features,* N.Y.L.J., May 25, 1953, p. 1745, Steuer, J.

The statute of limitations did not deprive a supplier of rubber of arbitration, in 1951, for recovery of damages caused by a breach of contract in 1942. The Court of Appeals, Second Circuit, in affirming the decision digested in *Arb. J.* 1952 p. 247, held that the six-year New York statute of limitations had not barred the arbitration regarded as an "action" (upon a contract obligation) and stated: "The effect of the limitations statute on the asserted obligations to obtain insurance will be determined by the arbitrators." *Reconstruction Finance Corp. v. Harrisons & Crosfield, Ltd.,* 21 U. S. Law Week 2562 (Court of Appeals, Second Circuit, May 2, 1953, Frank, J.; Clark, J., dissenting).

IV. THE ARBITRATOR

An employment contract with a charitable organization provided for arbitration by three arbitrators, one to be selected by each of the parties and the third by the two previously so selected. Petitioner objected to the arbitrator of the respondent on the ground that, as one of the trustees of the respondent he would be biased. But respondent refused to withdraw its choice for the reason that the contract placed no restriction on the selection of arbitrators, that he did not object to the petitioner's arbitrator, who would also be dis-

qualified as he was the plaintiff in a current litigation against the respondent, and that, moreover, the matter would "eventually be determined by the third arbitrator." The court refuted the respondent's position in stating: "Arbitrators are acting judges, not only the third one, but all of them. An arbitration should represent an honest conclusion, not necessarily unanimous, of the three—not the ability of either acting as an advocate to convince the third." However, the court gave the respondent the opportunity to nominate another arbitrator, and to object to petitioner's arbitrator, unless he desired to stand on the position he had taken, in which case the arbitrator would be appointed by the court. *Konvitz v. McCosker-Hershfield Cardiac Home, Inc.*, N.Y.L.J., May 15, 1953, p. 1639, Steuer, J.

Under the Rules of the National Federation of Textiles, each party to an arbitration designated an arbitrator and the two so selected designated the third. After the selection of the third arbitrator, one party objected to the other party's choice and that arbitrator withdrew. The party designating a substitute objected to the third arbitrator on two grounds, namely, that he had not been selected by the other two arbitrators "finally" designated to sit, and also that he was disbarred by former business associations with the other party. The court rejected these challenges in confirming the award and stating that "the third arbitrator was chosen in the method provided by the rules by an arbitrator of petitioner's choice. His subsequent rejection at respondent's request might give respondent the right to object to any act he had previously performed in the arbitration but certainly would give petitioner no such right." The further challenge of alleged former business associations of the arbitrator with the other party were not "substantiated by any convincing proof." *Raycrest Mills, Inc. v. Wasserstein Brothers,* N.Y.L.J., May 13, 1953, p. 1607, Steuer, J.

The construction of a contract and the determination of the question whether employees hired after November 1, 1950, were entitled to a cost-of-living bonus were within the arbitrator's competence. In confirming the award, the court said: "The merits of the award interpreting the agreement are no more subject to judicial review than if the award disposed of an issue of fact." *Snyder v. Photo-Engravers Board of Trade of New York, Inc.*, N.Y.L.J., January 27, 1953, p. 296, Hofstadter, J.

Agreements upon which arbitration was sought were challenged as illegal inasmuch as "the entire machinery or instrumentality of the respondents, including the office of the impartial chairman to arbitrate complaints and disputes, is so constituted as to be unfair and in many instances violative of law, harsh and unjust in its outcome." These charges were made by petitioners who have been in the ladies' coat and garment industry for sixty years, one of its members having been a governor of the industrial council which entered into the agreement on behalf of the employees. Said the court: "Any partiality or misconduct of the chairman during the proceedings or in connection therewith would be a matter for consideration of the courts. Any alleged impartiality at this time is not apparent from the papers submitted." Leaving the determination of arbitrable issues to the impartial chairman, the court denied a motion to stay arbitration. *Shapiro v. Rosenblatt,* N.Y.L.J., May 19, 1953, p. 1677, Dineen, J.

When both union and employers agreed that the arbitrator exceeded his jurisdiction, the award may not be upheld in part and modified in part. This, the court said, "would not be a correction of the present award, but instead the making of a wholly new award. Obviously the court may not assume the function of the arbitrator. In the circumstances, in fairness to both parties the matter should be remitted to the same arbitrator, an outstanding expert in the field of labor relations, whose familiarity with the situation will enable him to make a new award within the frame-work of the submission." *Committee for Companies and Agents Atlantic and Gulf Coasts v. National Maritime Union of America, C.I.O.*, N.Y.L.J., January 29, 1953, p. 329, Hofstadter, J.

Termination by timely notice to the seller of an agreement between a French and a Venezuelan corporation for the sale of oil, was a question to be determined solely by the arbitrator, inasmuch as the App. Div. stated: "All acts of the parties subsequent to the making of this contract, with its all embracing arbitration clause, which raise issues of fact or law are exclusively within the jurisdiction of the arbitrator." The decision directing arbitration of the entire controversy (279 App. Div. 851) was affirmed. *Compagnie Francaise des Petroles v. Pantepec Oil Company, C.A.*, 305 N.Y. 588.

The findings of an arbitrator as to fact or law which were made in an arbitration under a collective bargaining agreement may not be modified or corrected. The court, refusing any review, stated: "This is not a situation where the arbitrator so exceeded his powers as to warrant a modification of the award." *Korman v. Zimmerman*, N.Y.L.J., February 25, 1953, p. 619, Valente, J.

V. ARBITRATION PROCEEDINGS

The president of a corporation personally, not the corporation, is the contracting party to a union contract which was made in his individual name; the corporation's name was not even mentioned, although under his signature appears the word "president." This reference was considered meaningless and of no effect, the court saying: "For all one knows, this might refer to any corporation in which he might be associated in that capacity." An award against the president individually was therefore affirmed. *Truck Drivers Local Union No. 807 v. Pedowitz*, N.Y.L.J., March 23, 1953, p. 956, Eder, J.

An employment agreement provided for arbitration pursuant to the rules of the National Knitted Outerwear Association in the City of New York. Such arbitration was objected to because of the fact that defendant's counsel was the attorney for the Association, the Rules of which would govern the arbitration. The court stayed the court action in saying: "The mere fact that defendant's attorney is counsel for the association is no reason for assuming that plaintiff will not obtain a fair hearing." *Swiller v. Peter Freund Knitting Mills, Inc.*, N.Y.L.J., May 13, 1953, p. 1607, Hecht, J.

Security for costs in arbitration proceedings cannot be obtained. In denying such motion, the court said: "It is true that provisions for security for costs

apply to a special proceeding (C.P.A. 1531) and that arbitration is a special proceeding (C.P.A. 1459). The difficulty with the application is that what respondent seeks to have secured are the fees of the arbitrator and the expenses of the arbitration. These are not costs. They are not payable to the successful party. There is no provision in our practice for securing their payment, though there might well be." *Associated Spinners, Inc. v. Merino Wool Corp'n,* N.Y.L.J., May 22, 1953, p. 1727, Steuer, J.

VI. THE AWARD

The arbitrator's opinion does not form part of his award. This was stated recently by the Superior Court, Hartford County, Connecticut, as follows: "With the award the arbitrator simultaneously filed a lengthy opinion setting forth his reasons. The rules of the arbitration designated by the contract permitted but did not require this procedure. The Company takes the position that the opinion forms a part of the award. *Schoolnick v. Finman,* 108 Conn. 478, 481. It seems clear, however, that the arbitrator, under the permitted procedure, and in view of the form of the award, intended the award to be the document designated as such which contained the decision already quoted, and that he filed the opinion as a separate explanatory document. 'The award must of course contain that actual decision of the arbitrators which is the result of their consideration of the various matters submitted to them. But it need contain nothing else. The means by which they have come to this conclusion, the reasoning or the principles on which they base it are, unless the submission otherwise requires, needless and superfluous.' *In re Curtis-Castle Arbitration,* 64 Conn. 501, 513." In the case under consideration, however, the court vacated the award and found that the arbitrator had exceeded his authority inasmuch as the arbitrator was required by the submission to decide on a direct wage decrease of 9¾ cents per hour to offset a prior wage increase, and not, as he did, on a varied application of the decrease. *Local 63, Textile Workers Union of America, C.I.O. v. Cheney Brothers,* Superior Court, Hartford County, Conn., No. 94585, 20 LA 293, April 13, 1953, Alcorn, J.

A broad arbitration clause relating to "any dispute that might arise for any cause with respect to the meaning, scope, intent, applicability, application or interpretation of the contract" invested the arbitrator with functions to finally decide all questions of fact or law submitted to him. The parties appeared before the arbitrator, produced evidence and submitted briefs. Only after the arbitrator had decided the issue in question against the employer, did the latter claim the language in question was so clear as not to permit of any genuine dispute. In reversing the order which had vacated the award as not concerning an arbitrable issue, the App. Div. confirmed the award, while two dissenting judges held that the contract contained "a clear definition of 'year' as meaning a specified period of thirty-six weeks and therefore there is no arbitrable dispute." *Wagner v. Russeks Fifth Avenue, Inc.,* 281 App. Div. 825, 119 N.Y.S. 2d 269 (First Dept.).

The alleged physical inability of an employee to perform his duties in the position to which he had been reinstated by an award is not a matter which can

properly be considered on a motion to confirm the award. Said the court: "Presumably, provision is made in the collective bargaining agreement for the disposition of employees who become incapacitated." *Strauss Stores Corp. v. District 65, Distributive, Processing and Office Workers of America,* N.Y.L.J., April 8, 1953, p. 1160, Colden, J.

Arbitrator's right to reduce the penalty of discharging an employee for insubordination to the loss of a week's wages was sustained by the Connecticut Supreme Court of Errors, which in a unanimous decision reversed the decision of the Superior Court, Hartford, Conn. (digested in *Arb. J.* 1952, p. 177) and directed the entering of a judgment confirming the award. It refuted the company's argument that a finding that the employee "was insubordinate precluded the arbitrator from determining whether the disciplinary action by the company should be suspension or discharge. This argument is untenable for two reasons. In the first place, the primary question was not whether Lajoie's conduct amounted to insubordination but whether it constituted just cause for his discharge. While the contract gives to the company the right to 'suspend or discharge for cause any employee in order to maintain discipline and efficiency in production,' it gives that right subject to certain modifications. The company can discharge or lay off an employee only for 'just cause.' The arbitration clause stated that '(t)he arbitrator shall be confined in the decision to be rendered to the meaning and interpretation, or the application of an interpretation, of the particular provision or provisions of the contract which gave rise to the grievance or grievances.' As applied to the grievance in the instant case, this clause gave to the arbitrator the power to deal with the grievance in accordance with the terms of the contract. When the matter is viewed in this light, a finding of insubordination is not necessarily inconsistent, as claimed by the plaintiff and found by the court, with an award that the employee should be reinstated with a week's loss of pay. Even though Lajoie had been insubordinate, it did not necessarily follow that he should have been discharged. There was still the question whether his insubordination was of such a nature as to constitute 'just cause' for his discharge." *Niles-Bement-Pond Company v. Amalgamated Local 405, International Union, United Automobile, Aircraft and Agricultural Implement Workers of America,* Supreme Court of Errors, Connecticut April Term, 1953, Baldwin, J.

A self-contradictory award should not have been vacated on the ground that the arbitrator's finding of improper discharge of a driver on a milk route was inconsistent with the direction in the award that the employee upon reinstatement should forfeit two weeks' wages. The court, in reversing the order (digested in *Arb. J.* 1953 p. 62) stated that the arbitrator in his interpretation of the contract to the effect that the discharge was not proper, could deal with the issue of reinstatement and its terms. Though the latter, as the Court said, was not expressly submitted to the arbitrator, "it is necessarily implicit in submitting issues that could and did result in a finding of improper discharge. Since the employee involved was found by the arbitrator to be guilty of wrongful conduct, although not sufficient to justify dismissal, the award properly required that he be reinstated. It also fined him two weeks' pay. No objection was made by the union to the penalty and presumably it is satisfied entirely with the award.

Since, concededly, the arbitrator had power to order reinstatement, there is no reason why a condition could not be attached." *Samuel Adler, Inc. v. Local 584, International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America,* N.Y.L.J., June 15, 1953, p. 1995, Appellate Division, First Dept. (Per curiam; Cohn, J., dissenting).

Interest may only be allowed from the date of the award and not from the date of the filing of a mechanic's lien. *A. R. LaMura, Inc. v. Rochelle Arms Apartments, Inc.,* June 9, 1953, p. 1943, Eager, J.

When a buyer of Brazilian beeswax obtained an award for non-delivery of a shipment, he did not move for confirmation in the Supreme Court immediately, but obtained a warrant of attachment and then filed a motion to confirm the award, whereupon the case was removed to the Federal District Court of New York. The defendant Brazilian corporation contended that until confirmation of the award, no cause of action existed to support a warrant of attachment, but the court held that the Standard Arbitration Clause of the Inter-American Commercial Arbitration Commission, whereby "judgment upon any award may be entered in any court having jurisdiction thereof" did not provide that the statutory arbitration laws were the sole remedies of the parties. Since there was no reference to conducting arbitration proceedings solely in accordance with New York statutory law, the award may be enforced either under the statute or by an action on the award, as it was here done. The motion to vacate the warrant of attachment was therefore denied, since the award, though not confirmed, gave rise to a cause of action for its enforcement sufficient to support the warrant of attachment. *E. A. Bromund Co. v. Exportadora Affonso de Alburquerque, Ltda.,* 110 F. Supp. 502 (D.C N.Y., McGohey, D.J.).

Sharing of profits as compensation of a corporate technical production consultant was a disputed issue which was submitted to arbitration during a court proceeding. The confirmation of a majority award was challenged in that the award, in calculating the net profits and in accounting an advance payment, was based on an incorrect application of legal principles. The challenge was refuted, since it was not shown that the arbitrators intended to or did decide the matter on legal grounds or that the award was arrived at by undue means. Said the court in affirming that confirmation of the award: "Arbitration, if it is to be useful, must rest upon a certain philosophy for the settling of disputes. The parties when accepting arbitration name their own judges, frame the issues to be determined and bind themselves to accept the award, and can only set aside or modify the award by showing a violation of the pertinent statutes (R.S. 2A 24-7 et seq., N.J.S.A.). . . . It is fundamental that any such award will not lightly be set aside unless the dissatisfied party clearly establishes that the arbitrators indulged in any of the specified grounds of the statute that justify the vacating of the award. Deakman v. Odd Fellows Hall Ass'n, 110 N.J.L. 304, 164 A. 256 (E. & A. 1932)" *Anco Products Corp. v. T. V. Products Corp.,* 92 A. 2d 625 (Superior Court of New Jersey, App. Div., November 13, 1952, Smalley, J.S.C.)

A grievance arose when workers at the company's golf club plant staged a wildcat strike in sympathy with one who had been discharged for failing to make his quota on a new type of sander. The company dismissed some employees

for their participation in this unauthorized strike. Under a collective bargaining agreement providing for arbitration of differences between the company and the union or its members, the company had the right to discharge employees "for cause" and the union had the right to question dismissal of employees. The appointment of a judge of the Jefferson Quarterly Court as arbitrator was concurred in by all parties. The arbitrator ordered the reinstatement of the four dismissed employees and made separate awards concerning their seniority rights, vacation pay and lost wages. However, he did not order the reinstatement of the employee whose dismissal had set off the strike. The company did not reinstate the four employees, who instituted suit to compel the employer to comply with the award. The Court of Appeals of Kentucky reversed a judgment which had set aside the award because the arbitrator "failed to follow the law of the land," and directed compliance with the award, saying: "The law favors and encourages the settlement of controversies by arbitration, and arbitrators are not expected or required to follow the strict rules of law, it being sufficient that they have due regard for natural justice. If the parties wanted exact justice administered according to the forms of law they should not have agreed to substitute a private forum for a court of law. ***The record discloses no gross mistake of law or of fact on the part of the arbitrator such as would evidence partiality or fraud on his part. ***The four discharged employees were merely four out of some one hundred strikers and the arbitrator found nothing to justify their being singled out for 'firing' while no action was taken as to the other employees who took part in the strike." *Smith v. Hillerich and Bradsby Co., Inc.*, 253 S.W. 2d 629 (Ct. of Appeals of Kentucky, Waddill, Commissioner).

An award in a prior arbitration contained a direction that the purchaser of yarn should accept a certain quantity which had not been shipped but had been manufactured before the award was issued. The award provided for the delivery and payment for "the yarn in question" and a dispute arose as to whether the yarn thereafter shipped was the same yarn which was directed by the award to be delivered. The court ordered—and this order was affirmed—a second arbitration to be had before the same arbitrators who made the original award, to determine the naming of and the performance of the seller's obligation under the first award, inasmuch as these arbitrators would best be able to determine whether delivery was made of yarn answering the description in the first award. *Lafayette Worsted Spinning Co. v. Fashion Art Knitting Mills,* 281 App. Div. 259, 119 N.Y.S. 2d 366.

Discrimination against junior employees in promotion was a grievance arbitrated under a collective bargaining agreement which provided that "all decisions of the arbitrator shall be limited expressly to the terms and provisions of this agreement and in no event may the terms of this agreement be altered, amended or modified by the arbitrator." The company had participated in the selection of the arbitrator and consented to a hearing solely under the terms of the agreement and only upon stipulation between the parties to the effect that the company's participation would not impair its right to challenge the arbitrator's authority to hear and determine the question presented by the complainant. The Circuit Court of Hawaii affirmed the award to the effect that the principal factor

in deciding on promotion was qualifications for the job, and seniority linked with continuous service was to be taken into consideration only after there had been a finding that the qualifications of the competing employees were relatively equal. The Supreme Court of Hawaii, in reversing the judgment and thus vacating the award, stated: "Where an arbitration agreement contained in a collective bargaining agreement does not expressly confer upon the arbitrator jurisdiction to determine legal questions arising under the agreement but does limit his decision expressly to the terms and provisions of the agreement, the arbtrator has no authority to interpret or construe the provisions of collective bargaining but the court must determine the extent of this arbitrator's authority," relying on *Consolidated Vultee Aircraft v. United Automobile Workers,* 160 P. 2d 113. Said the court: "There is no provision in the contract, expressed or implied, that gives an arbitrator authority to examine and pass upon the qualifications and rights to promotion claimed by junior employees against senior employees." *Local Union 1357, Intl. Brotherhood of Electrical Workers, A.F.L. v. Mutual Telephone Co.,* Hawaii Supreme Court, No. 2919, 20 LA 524 (May 22, 1953, Steinback, J.).

Employees brought an action, not through the union, but as individuals, to recover from a newspaper publisher wages due them during a period in 1950 when publication of the newspaper was suspended by reason of a strike of another and different union. The employer had claimed that the employees were not entitled to any wages for the time they performed no services and failed to report for work. The union claimed that the employer had cut off from the payroll so-called "regular situation holders and regular substitutes." In arbitration proceedings between the union and the employer an award was rendered which denied wage claims to regular substitutes and this award, though objected to by the union, was confirmed by a judgment from which no appeal was taken. Plaintiffs in a new court action claimed that the arbitration was not binding on them as individuals because as individuals they had no notice of the proceedings and the union officials were faithless in their duties to their own membership. Since plaintiffs had made no motion to intervene in the previous court proceedings to prevent the judgment from being entered upon the award, and made no motion to vacate the judgment on the ground that it violated their rights, they were barred from collaterally attacking the judgment which confirmed the arbitrator's award as final. A judgment which had denied the employer's motion for summary judgment dismissing the complaint of the employees, was reversed on appeal, the court holding that "the judgment unappealed from is a bar to the present action and as long as it stands unreversed is final and conclusive." *Curtis v. New York World Telegram Corp.,* App. Div. 1st Dept., May 26, 1953, 20 LA 522.

Sturges on Arbitration. Wesley A. Sturges, Dean of Yale Law School, wrote "the" American law book on arbitration in 1930, when his treatise on "Commercial Arbitrations and Awards" was published. This book, however, has been out of print for many years and many changes have taken place. It is therefore most welcome that Dean Sturges now presents a new book: "Cases on Arbitration Law."* It comprises civil, commercial and labor-management arbitration, both common law and statutory. The timeliness of this book can be demonstrated no better than by quoting from the preface: "The use of arbitration agreements in both commercial transactions and collective bargaining agreements and the use of arbitration thereunder continue to expand. It seems reasonable to expect that lawyers of tomorrow will be called upon more and more to exercise professional competence in advising upon the use of such agreements and to engage in the practice of arbitration. Moreover, many court decisions both of earlier times and current vintage and many contemporary arbitration statutes deserve candid reexamination by the courts and legislatures to verify their expediency as legal regulations of the arbitral process in present-day usage."

This reexamination of arbitration statutes and court decisions is splendidly accomplished in the many notes which accompany the digest of cases. Specially dealt with are the questions of revocation and enforcement of arbitration agreements, the qualifications of arbitrators, preliminary considerations and arrangements for the hearings and the problems concerning the validity and effect of awards. One of the decisive problems in the practice of arbitration is the enforcement of awards against recalcitrant parties. With questions of challenge of awards most court decisions on arbitration, both in commercial and labor-management dispute-settlement, are concerned, and it is here that the author's long experience shows the master hand in dealing with the various intricate problems of enforcement procedure.

This is not only a case book for the law student and for the writer for legal periodicals, to whom the abundance of references becomes an indispensable tool for any further research. The book also serves well the needs of the practitioner, the arbitrator, the administrator of arbitration, and the representatives of the parties. Here they will find many sources which will facilitate consideration of the solution of problems which arise in the ever-expanding practice of civil, commercial and labor-management arbitration. In that field, Dean Sturges' Cases on Arbitration Law is a must!

* Matthew Bender & Company, New York. 1953. 912 pages. $9.00.

Arbitration in Legal Periodicals

"The Place of Law in Labor Arbitration," an address delivered by Archibald Cox at the annual meeting of the National Academy of Arbitrators, published in the February 1953 issue of the Chicago Bar Record vol. 34 p. 205, deals with the attitude of the arbitrator towards the law, under circumstances where the contract provision on which a grievance is based may violate a statute or public policy, or where the grievance is based on a legal obligation not embodied in the collective bargaining agreement. Professor Cox also deals most interestingly with legal principles as evidenced in court decisions, as precedents for the arbitrator's rulings. . . . "Arbitration vs. Litigation," Judge Stanley Mosk's address at the U.C. Los Angeles Conference on Arbitration, is the basis of the leading article in the March 1953 issue of the American Bar Association Journal, "The Lawyer and Commercial Arbitration"; it appears also in the March 1953 issue of the Commercial Law Journal, vol. 58, p. 63. . . . "The Role of Modern Arbitration in the Progressive Development of Florida Law" is an article by David S. Stern and Henry T. Troetschel, Jr., in the February 1953 issue of the Miami Law Quar., vol. 7, p. 205. . . . A note in 19 Brooklyn L. R. 106 (1952) deals with the issue of Arbitral Proceedings and the Right of an Attorney to be waived only by statutory compliance. . . . "The Dispute Clause of the Government Construction Contract: Its Misconstruction," is the title of a well-documented article by William H. Mulligan, in Notre Dame Lawyer, vol. 27 p. 167 (Winter, 1952). In this connection, the recent decision of the Court of Claims in *Grant Const. Co. v. U. S.*, digested p. 55, vol. 8 this Journal, offers new aspects of this ever-important question of the practice of arbitration under government contracts. . . . Two exhaustive notes in recent issues of American Law Reports Annotated, 2d Series, deal with interesting aspects of arbitration: vol. 26 p. 744, "Equity jurisdiction to determine valuation, where arbitration or appraisal has failed," and vol. 27, p. 1160, the question of "Arbitrator's viewing or visiting premises or property alone as misconduct justifying vacation of award". . . . An article by Morton Singer in 4 Labor Law Journal 9 (1953) deals with "Labor arbitration: basis for the evidence rule". . . . "The Applicability of the U. S. Arbitration Act to Collective Bargaining Agreements," is the basis of an interesting comment by William A. L. Crowe, in 12 Louisiana L. R. 462 (1952). . . . Clyde W. Summers, in "Judicial Review of Labor

Arbitration, or Alice Through the Looking Glass," 2 Buffalo L. R. 1 (1952), considers the effect of court interference in arbitration proceedings. . . . "Matters Arbitrable under Arbitration Provisions of Collective Labor Contract" is an exhaustive note in American Law Reports Annotated, 2d series, vol. 24 p. 754 (1953). . . . "The No-Strike Clause," by Carl H. Fulda, in 21 Geo. Wash. L. R. 127, is the 1952 Report of the Committee on Improvement of Administration of Union-Employee Contracts, Sec. of Labor Relations Law, of the American Bar Association. . . . An award of conditional penalty was unenforceable in *Matter of Publishers' Assn. of New York City,* 280 App. Div. 500, 114 N.Y.S. 2d 401, digested in Arb. J., 1952, p. 179. This case has been commented upon in 4 Syracuse L. R. 114 (1952), 2 Buffalo L. R. 157 (1952) and 66 Harvard L. R. 525 (1953), also in 24 N. Y. U. L. Rev. 217 (1953) and in 27 St. John's L. Rev. 346 (1953). Both notes consider the further case of *East India Trading Co., Inc. v. Halari,* 280 App. Div. 420, 114 N.Y.S. 2d 93, regarding the confirmation of a penal award for breach of contract. . . . The same issue of St. John's L. Rev. deals on p. 350 with the term "suit" within the meaning of an insurance policy, in a comment on *Madawick Contracting Co. v. Travelers Ins. Co.,* 281 App. Div. 754, 118 N.Y.S. 2d 115 (digested in *Arb. J.* 1953 p. 50). . . . The *Wilko v. Swan* case, 201 F. 2d 439 (2d Circ. 1953, digested in *Arb. J.* 1953 p. 45), now before the U. S. Supreme Court on certiorari granted June 1, 1953, is dealt with in two notes, in 66 Harvard L. Rev. 1326 (Arbitration clause in brokerage agreement precludes purchaser's statutory suit for misrepresentation) and in 53 Columbia L. Rev. 735 (Arbitration of claims under the Securities Act). . . . A note by Martin Domke on "The Enforcement in Great Britain of a New York Judgment Entered upon an Arbitration Award," in 2 Am. J. of Comp. Law 238 (1953), deals with the case of *East India Trading Co., Inc. v. Carmel Exporters and Importers, Ltd.,* 97 N.Y. 2d 556. . . . "The Ostrich and the Arbitrator: The Use of Precedent in Arbitration of Labor-Management Disputes," by Alvin B. Rubin and Elven E. Ponder, in 13 Louisiana L. Rev. 208, treats interestingly this much disputed issue, referring in twenty-six notes to further pertinent documentation.